Supreme Court, U.S.
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No. 98-59

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

WILLIAM JACKSON,
Petitioner,

v.

CSX TRANSPORTATION, INC.,
and DOUG CORCORAN,
Respondents.

On Petition for a Writ of Certiorari to the Louisiana Supreme Court

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RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

Respondent, CSX Transportation, Inc., disagrees with Petitioner's statement of the questions presented for review. The questions presented for consideration are:

1. Did petitioner, William Jackson, timely and properly raise a federal question in the state court proceedings?

2. Assuming petitioner raised the question properly, does the Seventh Amendment or any other federal requirement affect a Louisiana state appellate court's right to apply state procedures of appellate review to increase a jury damage award in a suit under the Federal Employers' Liability Act ("FELA")?

LIST OF INTERESTED PERSONS AND RULE 29.6 NOTATION

The parties to the proceedings below were William Jackson (petitioner-plaintiff), CSX Transportation, Inc., and Doug Corcoran (defendants). Before trial, Jackson voluntarily dismissed Corcoran as a defendant, and he is no longer a party to the case.

Under this Court's Rule 29.6, CSX Transportation, Inc. (defendant-respondent) certifies that it is owned by its parent company, CSX Corporation. Its nonwholly owned subsidiaries include the following publicly owned companies: Allegheny and Western Railway Company, The Baltimore and Cumberland Valley Rail Road Extension Company, The Central Railroad Company of South Carolina, The Cincinnati Inter-Terminal & Valley Railroad Company, Dayton and Michigan Railroad Company, and The Home Avenue Railroad Company.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, CSX Transportation, Inc., respectfully asks this Court to deny William Jackson's petition for a writ of certiorari. In this FELA case tried in Louisiana state court, Jackson argues that the Seventh Amendment prohibits a state appellate court from increasing the jury's damage award under state appellate procedure and that the court must instead follow federal procedure and remand the case for a new trial. Jackson has no ground for certiorari review for at least two reasons.

First, because Jackson failed to raise his asserted constitutional question timely and properly in the courts below, this Court should not even consider the merits of his application. Instead of raising this Seventh Amendment issue at the first opportunity after the verdict in the district court, Jackson asked the trial judge to set aside the jury's damage award and enter an increased amount

de novo as an independent trier of fact under Louisiana procedural law. Thereafter, on appeal, though citing the Seventh Amendment and seeking a new trial, Jackson alternatively asked the state intermediate appellate court to set aside the jury's verdict of comparative fault and to reallocate the percentages of fault without remanding the case. After the court of appeal increased the damage award, Jackson asked for a further increase on rehearing as an alternative to a new trial. Thus, he deliberately sought relief in the lower courts according to Louisiana's procedures of review of jury verdicts and advocated positions directly contrary to the arguments he now raises in this Court based on the Seventh Amendment. Under principles of waiver and estoppel, as well as the pleading requirements for constitutional issues, this Court should summarily deny Jackson's application because he has failed to preserve a federal question for this Court's review.

Second, even assuming Jackson had properly raised the issue in the courts below, the Louisiana appellate court did not violate the Seventh Amendment by increasing the jury's verdict on appeal in this case. This Court has long held that the Seventh Amendment does not apply to FELA cases tried in state court. Although federal substantive law applies, state appellate procedures govern the case, and the right of review in an appellate court is purely a matter of state concern. Louisiana's procedures of appellate review of jury damage awards do not affect the substantive law of the FELA. No compelling reason exists for granting certiorari in this case.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

In addition to U.S. Const. amendment VII and 45 U.S.C. § 51 of the FELA, both set forth at pages 2-3 of Jackson's writ petition, the applicable Louisiana statutes concerning state procedures of appellate review are La. Const. art. 5, § 10(B) and La. Code Civ. P. art. 2164:

La. Const. art. 5, § 10(B). Scope of Review.

> Except as limited to questions of law by this constitution, or as provided by law in the review of administrative agency determinations, appellate jurisdiction of a court of appeal extends to law and facts.

La. Code Civ. P. art. 2164:

> The appellate court shall render any judgment which is just, legal, and proper upon the record on appeal. The court may award damages for frivolous appeal, and may tax the costs of the lower or appellate court, or any part thereof, against any party to the suit, as in its judgment may be considered equitable.

STATEMENT OF THE CASE

William Jackson injured himself while working as a switchman in CSX's rail yard, when he mounted a flatcar and stepped into a functional opening known as a "container housing" in its floor. He filed a petition for damages in Louisiana state court in Orleans Parish against CSX and his supervisor, Doug Corcoran. After voluntarily dismissing Corcoran as a defendant, Jackson proceeded to a five-day jury trial against CSX on his claim under the FELA. He asserted that CSX had negligently failed to provide him with a safe place to work, adequate fixed lighting, and an adequate hand-held lantern or other "safety equipment." The overwhelming evidence conflicted with Jackson's version of the accident and readily established that he was largely if not totally at fault.

The jury returned a verdict finding that the negligence of both CSX and Jackson had legally caused the accident. It apportioned 70% of the fault to Jackson and 30% to CSX, and assessed $62,000 as lump-sum damages. Based on the jury's verdict, the district court signed a judgment on the same day awarding Jackson the sum of $18,600, all costs of the proceedings, and interest on the principal judgment and costs from date of judgment until paid.

The trial judge thereafter denied Jackson's alternative motions for judgment notwithstanding the verdict, new trial, and additur.

On Jackson's appeal, the Louisiana Fourth Circuit Court of Appeal, the state's intermediate appellate court, affirmed the jury's apportionment of 70% fault to Jackson. The court of appeal noted the jury's "obvious belief that Jackson himself was in the best position to prevent [his] injuries" and rejected Jackson's arguments asserting prejudicial evidentiary rulings and the trial judge's alleged bias against him. Nevertheless, the panel concluded that the jury had abused its discretion in awarding $62,000 in lump sum damages. Applying Louisiana's procedures for reviewing jury damage awards, the appellate court increased Jackson's damage award to $125,000, reduced by his 70% comparative negligence, upon finding that $125,000 represented the lowest reasonable general damage award for any plaintiff who sustains a disc injury requiring surgery. The Fourth Circuit recognized, however, Jackson's "minimal effects from the injury" and concluded that the record evidence supported a jury finding "that Jackson's limited income since the accident and in the future was a matter of his own choosing rather than a consequence of the accident." The court of appeal further amended the judgment to award interest on costs only from the date of judgment fixing those costs. In all other respects, it denied Jackson's assignments of error and affirmed the district court's judgment. In a subsequent *per curiam* opinion, the Court of Appeal granted rehearing solely to clarify that Jackson's net recovery after reduction for his comparative negligence was $37,500.

Both Jackson and CSX applied for writs of certiorari in the Louisiana Supreme Court, seeking review of the Fourth Circuit's decision. In its application, CSX asked the state's highest court to reinstate the jury's award and opposed Jackson's request for a new trial on damages. The Louisiana Supreme Court denied both writ applications. Jackson has now petitioned this Honorable Court

for a writ of certiorari, asserting that the Seventh Amendment entitles him to a new trial.

REASONS FOR DENYING THE WRIT

I. PETITIONER FAILED TO RAISE A FEDERAL QUESTION PROPERLY AND TIMELY IN THE STATE COURT PROCEEDINGS

This Court has long held that it cannot consider an alleged federal question unless the party presenting it has timely and properly raised and pursued it at the appropriate point or points in the state court proceedings. *Godchaux Co. v. Estopinal*, 251 U.S. 179, 181 (1919); *Beck v. Washington*, 369 U.S. 541, 550-54 (1962). Likewise, under Louisiana jurisprudence, appellate courts will not consider a constitutional question on appeal unless it was raised by pleadings in the court below. *Stovall v. City of Monroe*, 199 La. 195, 5 So. 2d 547, 552 (1941). Furthermore, this Court's Rule 14.1(g)(i) requires a petitioner seeking certiorari review of a state court judgment to specify "the stage in the proceedings, both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were raised. . . ." The petitioner must show that the federal question was timely and properly raised by specifying the method or manner of raising the question, as well as the way that the state courts passed on it, and must quote or summarize specific portions of the record where the matter appears. *Id.*

The statement of the case in Jackson's writ application does not specify how or when he raised in the Louisiana trial or appellate courts his asserted constitutional issue based on the Seventh Amendment. Moreover, a simple reading of the Louisiana Fourth Circuit Court of Appeal's opinion reveals that the state courts never meaningfully addressed or ruled on the question. The short excerpt from the appellate court's opinion that Jackson cites on page 8 of his writ application is pure dictum that only briefly alludes to federal jurisprudence concerning appellate re-

view in FELA cases. In that cryptic reference, the state appellate court did not pass on an issue of constitutional dimension. The Louisiana Supreme Court summarily denied Jackson's writ application without any opinion at all. As the record readily shows, Jackson failed to timely and properly raise a constitutional issue for this Court to resolve.

After the verdict and judgment in this case, Jackson filed a motion for judgment notwithstanding the verdict in the Louisiana district court and alternatively moved for a new trial or additur in lieu of granting a new trial. In that pleading, Jackson raised no issue concerning the Seventh Amendment. To the contrary, he specifically asked the Louisiana trial judge to set aside the jury's damage award and to enter an increased award *de novo* as an independent trier of fact under the Louisiana state procedure for granting a judgment n.o.v. At pages 19-20 and 38-39 of his memorandum in support of his post-judgment motions, Jackson likewise referred to Louisiana's procedures of appellate review of jury awards and made no mention of any Seventh Amendment limitation on either the state's district or appellate courts:

> The federal and state standard are the same. That is, whether reasonable men could not arrive at a contrary verdict. Once the trial court concludes that a JNOV is warranted because reasonable men could not differ on the fact that the award here was abusively low, it must then determine what is the proper amount of damages to be awarded. In making this determination, the trial judge is not constrained as the [Louisiana] Courts of Appeal are of raising the award to the lowest point which is reasonably within the discretion afforded that court. The trial court is able to render a *de novo* award based on the trial court's independent assessment of the injuries and damages. The trial judge is in a better position to make a damage assessment than is an appellate court. The trial court hears the testimony, views the evidence and is able to evaluate the credibility

> of the witnesses. Once the jury verdict is set aside under the JNOV standards, the trial court is then the trier of fact. It should not be limited by the same constraints placed upon an appellate court reviewing a damage award. *Anderson v. New Orleans Public Service,* 583 So.2d 829 (La. 1991).
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> * * * *
>
> In the event that this Court were an appellate court and could only raise the general damages to the minimum allowed by law, that minimum would be somewhere in neighborhood of $125,000.00 to $140,000.00. The highest general damage awards seem to be in the $400,000.00 to $440,000.00.
>
> However, as stated earlier, in accordance with *Anderson v. New Orleans Public Service, supra,* this Court is not an appellate court and is free to render a general damage award *de novo.* Given the lowest range is $125,000.00 and the highest is $440,000.00, this Court could render a verdict in accordance with the law and amply supported by the record of a general damage award of $282,500.00, the midpoint between $125,000.00 and $440,000.00. However, plaintiff prays that a general damage award be made of $275,000.00.

Although Jackson alternatively moved for a new trial or an additur, he informed the trial court at page 41 of his memorandum "that the proper relief in this matter requires the granting of a JNOV and that a fair and reasonable award be made to William Jackson." He expressed his "preference that the JNOV be granted" and did not argue that the Seventh Amendment entitled him to another jury trial on either liability or damages. *Id.*

Thereafter, at page 7 of his appellate brief to the Louisiana Fourth Circuit Court of Appeal, the state's intermediate appellate court, Jackson asserted for the first time that the Seventh Amendment required a remand for a new trial in this FELA case. That argument was flatly contrary to his prior recognition of Louisiana's appellate

procedures of review in his post-judgment memorandum and his request in the district court that the trial judge enter a *de novo* verdict as an independent trier of fact under Louisiana procedure, without the need for a new jury trial. Furthermore, Jackson selectively argued the Seventh Amendment issue in the court of appeal. Although he sought a new trial on damages, in a supplement to his appellate brief, he specifically asked the court of appeal alternatively to set aside the jury's appointment of fault between the parties and reassess fault against CSX without a remand for a new trial on that issue.

> To the extent that the Court [of Appeal] does not remand it for a new trial but agrees there was error, plaintiff submits that the jury abused its discretion and that this Honorable Court should reallocate that 70% to CSX.

Even in his application for rehearing after the court of appeal increased the damage award from $62,000 to $125,000, though citing the Seventh Amendment and asking for a remand for a new trial, Jackson alternatively requested at pages 1 and 6 of his application that the appellate court amend and increase the damage award even further.

Unhappy with the amount of the appellate court's increase of his damages and its affirmance of the apportionment of fault and liability, Jackson later urged Seventh Amendment arguments on applying for certiorari in the Louisiana Supreme Court and in this Court. He now contends that he has a constitutional right to a new jury trial and that the state court of appeal was forbidden from amending the damage award.

The record shows that Jackson failed to raise his Seventh Amendment issue timely and properly in the district court and made arguments both in the trial court and the court of appeal that are totally inconsistent with the position that he now urges in his writ application. Based on

principles of waiver and judicial estoppel, as well as Louisiana state procedures and the requirements under settled Supreme Court jurisprudence for pleading constitutional issues, this Court should summarily deny the petition for lack of jurisdiction without even addressing the merits of Jackson's arguments.

II. LOUISIANA'S PROCEDURES OF APPELLATE REVIEW OF JURY DAMAGE AWARDS IN FELA CASES TRIED IN ITS STATE COURTS DO NOT VIOLATE THE SEVENTH AMENDMENT

Even assuming Jackson had timely and properly raised a constitutional question below, his argument has no merit. Appellate review of the verdict and judgment in the Louisiana court system did not infringe upon the Seventh Amendment or the substantive federal law applicable to his FELA claim. There is no reason to grant certiorari to review a ruling that is fully consistent with Supreme Court jurisprudence on these issues.

Jackson bases his entire writ application on the false premise that he has a constitutional right to a jury trial in the Louisiana state court where he elected to bring his FELA claim. But as this Honorable Court has clearly held in an FELA case, the Seventh Amendment does not apply to the states.

In *Minneapolis & St. Louis R.R. Co. v. Bombolis*, 241 U.S. 211 (1916), a death action brought under the Federal Employers' Liability Act in a Minnesota state court, the Supreme Court of Minnesota affirmed a less-than-unanimous jury verdict in favor of the plaintiff according to a Minnesota statute. The defendant argued that he had a right to a unanimous verdict under the Seventh Amendment, as was required in the federal courts. This Court held that no such right existed because the Bill of Rights is not concerned with state action, but deals only with federal actions. 241 U.S. at 217. As a necessary corollary,

> the 7th Amendment applies only to proceedings in courts of the United States, and does not in any manner whatever govern or regulate trials by jury in state courts, or the standards which must be applied concerning the same.

Id. See also Georgia v. McCollum, 505 U.S. 42, 52 (1992) (citing *Bombolis* for the rule that "[s]tates do not have a constitutional obligation to provide a jury trial in civil cases"). This Court held that the right to trial by jury is not a fundamental aspect of due process or liberty protected by the Fourteenth Amendment and that the Seventh Amendment is not applicable to state court proceedings.

The petitioner in *Bombolis* further argued that its rights under the FELA were of a federal character, and as the Seventh Amendment is controlling upon Congress, its provisions must also apply to rights granted by Congress. 241 U.S. at 219-20. This Court rejected these arguments, because Congress was certainly aware of the well-settled rule that the Seventh Amendment is inapplicable to the states. Because these principles were so "completely and conclusively" settled, this Court reasoned that in enacting the FELA Congress:

> clearly contemplate[d] the existence of a concurrent power and duty of both Federal and state courts to administer the rights conferred by the statute in accordance with the modes of procedure prevailing in such courts.

Id. at 218. This Court noted in *Bombolis* that the plaintiff's arguments would "distort and destroy" the Constitution and would create "confusion" that would obscure the fact that the Seventh Amendment applies only to tribunals of the United States. *Id.* at 219-20. To hold otherwise would mean that the courts of the states would be considered as state or federal courts from day to day depending upon the subject matter of the controversy under consideration. *Id.* at 220-21. On the contrary, the

states are empowered to protect and enforce rights created under either system according to their own state procedures. *Id.* at 221-22. As the Fifth Circuit has more recently reaffirmed in the context of a Jones Act suit, "the argument that a federal right has an appurtenant Seventh Amendment guarantee applicable to state court proceedings was rejected long ago by the Supreme Court." *Linton v. Great Lakes Dredge & Dock Co.*, 964 F.2d 1480, 1491 (5th Cir.), *cert. denied*, 506 U.S. 975 (1992).

As in the *Bombolis* case, Jackson's writ application rests upon a "grave misconception of the very fundamentals of our constitutional system of government." 241 U.S. at 219. There is no constitutional right to a jury trial in an FELA action brought in state court.

Citing *Dice v. Akron, Canton & Youngstown R.R.*, 342 U.S. 359 (1952), Jackson contends that state appellate courts must use federal procedures of review in FELA cases and that Louisiana's practice of raising inadequate jury awards to the lowest reasonable amount on appeal instead of remanding the case for a new trial "offends" the Seventh Amendment. The *Dice* decision lends no support whatsoever to his unfounded arguments. In *Dice*, a petitioner seeking damages under the FELA alleged that his railroad employer was negligent and that a purported prior release of his claim was void because of fraud. In setting aside the jury's damage verdict, the Ohio state court applied Ohio law that singled out the fraudulent release issues for determination by the judge under Ohio substantive law rather than by the jury under federal law. In reversing the decision, this Court held that federal law, not state law, controlled the validity of the release and that the Ohio courts had erred in taking away the verdict when the issue of fraud had been submitted to the jury. Ohio's selective treatment of the fraudulent release claim for decision by the judge in that manner did not comport with the purposes of the FELA. This

Court remarked that "the Bombolis case might be more in point had Ohio abolished trial by jury in all negligence cases including those arising under the federal Act." 342 U.S. at 363.

The Supreme Court in *Dice* did not hold that the FELA guarantees the right to a jury trial in state courts in accordance with the procedures required in federal courts. Rather, *Dice* merely recognizes that substantive state law and its selective and discriminatory application cannot hinder the statutory purposes of the FELA. In this case, unlike the litigant in *Dice*, Jackson enjoyed a five-day jury trial of all issues under the substantive FELA law. Louisiana's procedural law uniformly afforded Jackson a jury trial of his FELA claim and appellate review as in any civil suit, and he does not allege that the state courts improperly administered their procedures.

Jackson further wrongly relies on *Hetzel v. Prince William County*, 118 S. Ct. 1210, 1211-12 (1998), for its holding that a federal court of appeals in granting a remittitur must permit the plaintiff the option of a new trial in the district court before requiring the district court to enter judgment for the lesser amount. The *Hetzel* decision is obviously distinguishable because it applied the Seventh Amendment guarantee of the right to a jury trial in a proceeding in federal court. In contrast, this suit, which Jackson filed by choice in a Louisiana state court, does not involve the Seventh Amendment. There is simply no constitutional right to a jury trial in the state courts. Moreover, because *Hetzel* is a Title VII case, it does not implicate the statutory requirements of the FELA. *Hetzel* is completely inapposite.

Furthermore, Louisiana's procedures of appellate review of jury verdicts do not violate the Seventh Amendment or the substantive law of the FELA. Although federal substantive law applies in an FELA action filed in state court, state procedural rules govern the case. *Monessen Southwestern Ry. Co. v. Morgan*, 486 U.S. 330, 357 (1988);

St. Louis Southwestern Ry. Co. v. Dickerson, 470 U.S. 409, 411 (1985). Each state can decide how to structure its judicial system, and the right of review in an appellate court is purely a matter of state concern. *See Johnson v. Fankell*, 117 S. Ct. 1800, 1805 (1997) (citing *Kohl v. Lehlback*, 160 U.S. 293, 299 (1895)). In fact, "due process does not independently require that the State provide a right to appeal." *M.L.B. v. S.L.J.*, 117 S. Ct. 555, 566 (1996). Thus, Jackson was not constitutionally entitled to any sort of appellate review of the jury verdict in his favor, much less a particular procedure of review. The Louisiana Fourth Circuit Court of Appeal's review of the verdict and increase of the damage award according to Louisiana constitutional and statutory requirements for appellate review actually provided Jackson more protection than the federal constitutional and statutory requirements on which he attempts to rely.

Article 5, § 10(B) of the Louisiana Constitution of 1974 provides that "appellate jurisdiction of a court of appeal extends to law and facts." Article 2164 of the Louisiana Code of Civil Procedure implements this provision by providing that "[t]he appellate court shall render any judgment which is just, legal, and proper upon the record on appeal." The review of facts and law has been part of the Louisiana appeals process since 1816. Note, *Civil Procedure—Remand—Right to a Jury Trial*, 41 Tul. L. Rev. 922, 922 (1967). In fact, Louisiana appellate courts have a constitutional duty to review quesitons of fact as well as questions of law, and to enter judgment accordingly where the record is otherwise complete. *Ragas v. Argonaut Southwest Ins. Co.*, 388 So. 2d 707 (La. 1980); *Gonzales v. Xerox Corp.*, 320 So. 2d 163 (La. 1975). The Eastern District of Louisiana confronted this issue and decided—and the United States Supreme Court affirmed—that Louisiana's system is constitutional and that the Seventh Amendment has no applicability in the Louisiana state courts. *Melancon v. McKeithen*, 345 F. Supp. 1025, 1027-28, 1045-48 (E.D. La.

1972) (Wisdom, J.), *aff'd sub nom. Mayes v. Ellis*, 409 U.S. 943 (1972) (mem.), *aff'd sub nom. Hill v. McKeithen*, 409 U.S. 943 (1972) (mem.), *aff'd sub nom. Davis v. Edwards*, 409 U.S. 1098 (1973) (mem.). Louisiana's appellate courts may properly reexamine jury fact findings in civil cases. *Id.* There is no reason to disturb this long-standing legal principle in this case.

Moreover, in his writ petition to this Court, Jackson has misstated the Louisiana procedures of appellate review of jury verdicts. In exercising their constitutional powers to review the factual findings of trial judges and juries, the Louisiana appellate courts are constrained by the "manifest error" rule, whereby the reviewing court gives great weight to the factual conclusions of the trier of fact and does not disturb reasonable evaluations of credibility and inferences of fact. *Canter v. Koehring Co.*, 283 So. 2d 716, 724 (La. 1973). In the absence of a finding of manifest error, the appellate court cannot merely "disagree" with the jury on factual issues and substitute its own judgment or views for those of the trier of fact. *Sistler v. Liberty Mut. Ins. Co.*, 558 So. 2d 1106, 1114 (La. 1990).

In cases where manifest error occurs or some prejudicial error of law taints the jury's factual findings, however, the Louisiana appellate court is not required to remand the case for a new trial, but should make an independent review and determination of the facts from the complete record. *McLean v. Hunter*, 495 So. 2d 1298, 1301 (La. 1986). Here, the Louisiana court of appeal found no reversible error of law in the trial of Jackson's case.

Contrary to Jackson's repeated assertions throughout his petition for certiorari, the Louisiana appellate court did not review the jury's award "*de novo*" and grant an "additur." Rather, the court of appeal applied a far different and distinct scope of review—the "abuse of discretion" standard—in examining the quantum of the damage award. *See Arceneaux v. Domingue*, 365 So. 2d 1330,

1333 n.1 (La. 1978). Under that procedure, only after analyzing the facts and determining that they disclose an abuse of discretion may the reviewing court consider an award as being either insufficient or excessive for articulated reasons. *Youn v. Maritime Overseas Corp.*, 623 So. 2d 1257, 1260-61 (La. 1993), *cert. denied*, 510 U.S. 1114 (1994); *Reck v. Stevens*, 373 So. 2d 498, 501 (La. 1979). The Louisiana court of appeal may then modify the award, but only to the extent of raising an inadequate award to the lowest point (or lowering an excessive award to the highest point) that is reasonable based on the record. *Youn v. Maritime Overseas Corp.*, 623 So. 2d at 1260-61. As the Louisiana Supreme Court has long held, "It is never appropriate for a Court of Appeal, having found that the trial court abused its discretion, simply to decide what it considers an appropriate award on the basis of the evidence." *Coco v. Winston Industries, Inc.*, 341 So.2d 332, 335 (La. 1976).

In this case, applying these state procedures of appellate review that respect the jury's discretion, the Louisiana Fourth Circuit Court of Appeal increased Jackson's award to what it considered the lowest reasonable amount. It did not enter the award *de novo*. It likewise did not enter an "additur," which is an entirely different procedure under Article 1814 of the Louisiana Code of Civil Procedure, whereby the trial judge reforms the verdict with the consent of a party as an alternative to a new trial on damages only.

Under the settled principle that state procedural law applies to an FELA case filed in state court, Louisiana's procedures of appellate review governed the appeal of the jury award in this case. This result is consistent with this Court's decision in *Bombolis*, cited above, which recognizes that state courts apply the FELA according to their prevailing "modes of procedure." 241 U.S. at 218. *See also Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 712 (1986) ("[S]tate courts are not required to apply

Rule 52(a)—a rule of *federal* civil procedure—to their own appellate system for reviewing factual determinations of trial courts.").

Here, like any other civil litigant in the Louisiana court system, Jackson enjoyed a jury trial on the merits of his FELA claim. The district court correctly adopted the verdict and refused to grant a JNOV, new trial, or additur under state procedures that Jackson asked the court to apply. Applying state procedures of appellate review, the Louisiana appellate court increased the jury's damage verdict but otherwise affirmed its findings of liability and apportionment of fault. Although CSX disagrees with the increase of the judgment on appeal, in no event did the Louisiana courts contravene the Seventh Amendment, which does not even apply in this case. Jackson is not entitled to a remand for a new trial on damages or any other issue.

CONCLUSION

This case does not merit a grant of certiorari. William Jackson failed to raise his alleged federal question involving the Seventh Amendment at the earliest opportunity for seeking review of the jury's award in the Louisiana district court and sought relief totally inconsistent with the arguments that he now raises in his petition for certiorari. Under these circumstances, Jackson has waived any right to now assert that the Seventh Amendment prohibited the state appellate court from amending the jury's verdict.

Furthermore, the Seventh Amendment does not apply to FELA cases tried in state courts, which are entitled to apply their own procedural law. Appellate review of the jury verdict in this case under Louisiana's procedures did not violate the Seventh Amendment or the substantive law of the FELA.

For the foregoing reasons, respondent, CSX Transportation, Inc., respectfully asks this Court to deny William Jackson's petition for a writ of certiorari.

Respectfully submitted,

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